

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
LILLIAN E. DAVISON	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Period August 1, 1978	:	
through May 22, 1982.	:	

---

Petitioner, Lillian E. Davison, 320 East 58th Street, New York, New York 10022, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period August 1, 1978 through May 22, 1982 (File No. 800757).

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 9, 1987 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes with respect to McCordi Corporation for the period at issue and willfully failed to do so, thereby becoming liable for a penalty imposed pursuant to Tax Law § 685(g).

FINDINGS OF FACT

1. On July 25, 1983, the Audit Division issued a Notice of Deficiency along with a Statement of Deficiency to petitioner, Lillian E. Davison, asserting a penalty equal to the amount of unpaid withholding taxes which the Audit Division determined to be due from McCordi Corporation (hereinafter "the corporation"). The deficiencies asserted were as follows:

<u>Period</u>	<u>Amount</u>
8/1/78 - 12/31/78	\$14,913.45
1/1/79 - 12/31/79	36,636.30
4/1/80 - 4/15/80	1,206.57
7/1/80 - 7/15/80	3,046.38
5/16/82 - 5/22/82	<u>97.24</u>
	\$55,899.94

2. Based upon information presented by petitioner at a prehearing conference, it was determined that petitioner was liable for the penalty imposed pursuant to Tax Law § 685(g) only for the period August 1, 1978 through April 30, 1979. The penalty asserted by the Audit Division to be due from petitioner was, therefore, revised as follows:

<u>Period</u>	<u>Amount</u>
8/1/78 - 12/31/78	\$14,913.45
1/1/79 - 4/30/79	<u>12,805.18</u>
	\$27,718.63

Petitioner does not contest the amount of the penalty as revised herein, but does contest the Audit Division's determination that she was a person against whom such penalty should be imposed.

3. In or about 1978, petitioner commenced negotiations in an attempt to purchase McCordi Corporation from its majority stockholders. Under the terms of an agreement entered into between the parties, petitioner paid one-third down with the remaining two-thirds to be paid over a term of years on an installment basis. The shares of stock to be purchased by petitioner were held in escrow pending payment of the entire purchase price.

4. On July 13, 1978, petitioner assumed the presidency of the corporation. She soon thereafter became aware that the corporation was in very poor financial condition. Specifically, petitioner learned that the corporation owed the sum of \$42,000.00 in back withholding taxes on salaries previously paid to employees. She immediately saw to it that the corporation paid the said withholding taxes. Petitioner thereafter met with the comptroller of the corporation who assured her that future withholding tax liabilities, since they were not substantial in amount, could and would be paid promptly. From the time that the \$42,000.00 in back withholding taxes

was paid until April 1979 when she became aware that the corporation was again delinquent in its withholding tax obligations, petitioner failed to make inquiries to assure that such obligations were, in fact, being discharged in a timely manner. The comptroller was hired by and was directly reportable to petitioner.

5. In January 1979, when the withholding taxes for the last quarter of 1978 were due, petitioner requested an extension of time to pay due to the fact that corporate records were being audited. Subsequent to her assuming the presidency, petitioner had retained independent auditors to perform a complete audit of the company's books and records. When the prior owners of the corporation (majority stockholders who retained seats on the board of directors) learned that the results of this audit disclosed that misrepresentations had been made to petitioner concerning the corporation's financial condition, a meeting of the board was called and, on April 19, 1979, petitioner was discharged. Shortly before her discharge, petitioner was made aware that withholding taxes had not been paid. In an attempt to satisfy some of the withholding tax deficiencies, petitioner deposited the proceeds of an insurance check, made payable to the corporation for flood damage, into a corporate bank account. She left the corporation before checks could be issued to pay the withholding taxes.

6. From July 13, 1978 until April 19, 1979, petitioner was the president of the corporation and was responsible for procuring sales and for overseeing the entire operation of the business. She worked full time for the corporation, received a salary and had the authority to hire and fire employees. Along with two of the bookkeepers, petitioner had the authority to and did actually sign corporate checks. Check signing authority was granted to petitioner and the bookkeepers by the board of directors. The corporation's payroll was prepared by a payroll service, A.P.S. The comptroller (hired by petitioner), acting on information provided by the payroll service, was responsible for the preparation of the corporation's withholding tax returns. Petitioner was responsible for signing checks for payment of the withholding taxes due. She does not know whether withholding tax returns were filed and taxes were paid after the issuance of the

\$42,000.00 check soon after her assumption of the presidency of the corporation.

### CONCLUSIONS OF LAW

A. Where a person is required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such taxes, Tax Law § 685(g) imposes on such person "a penalty equal to the total amount of tax evaded, or not collected, or not accounted for and paid over."

B. Tax Law § 685(n) defines "person", for purposes of Tax Law § 685(g), to include:

"an individual, corporation or partnership or an officer or employee of any corporation...who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

C. Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes during the period in issue is a question of fact (Matter of McHugh v. State Tax Commission, 70 AD2d 987, 988; Matter of Maclean v. State Tax Commission, 69 AD2d 951, affd 49 NY2d 920). Factors which are relevant to this determination include whether the individual signed the corporation's tax returns, derived a substantial part of his income from the corporation and possessed the right to hire and fire employees (Matter of Amengual v. State Tax Commission, 95 AD2d 949, 950; Matter of Malkin v. Tully, 65 AD2d 228, 231). Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties (Matter of Amengual v. State Tax Commission, supra).

D. Petitioner was a person required to collect, truthfully account for and pay over the withholding taxes of McCordi Corporation for the period August 1, 1978 through April 30, 1979. She was the president of the corporation, derived a substantial portion of her income from the corporation and had entered into an installment agreement to purchase a majority interest in corporate stock. She had the authority to sign corporate checks and tax returns. She was, therefore, under "a duty to act" on the corporation's behalf within the meaning of Tax Law § 685(n) and was thus a "person" under Tax Law § 685(g).

E. Inasmuch as petitioner was a "person" for purposes of Tax Law § 685(g), her liability

for the penalty at issue herein rests upon a determination as to whether she willfully failed to collect and pay over the withholding taxes of McCordi Corporation. The test of willfulness is as follows:

"[W]hether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes.... No showing of intent to deprive the Government of its money is necessary but only something more than accidental nonpayment is required". (Matter of Levin v. Gallman, 42 NY2d 32, 34.)

F. Petitioner's failure to collect and pay over withholding taxes was willful under Tax Law § 685(g). Persons responsible for payment of withholding tax pursuant to Tax Law § 685(g) may not "absolve themselves merely by disregarding their duty and leaving it to someone else to discharge (Matter of Gardineer v. State Tax Commn., 78 AD2d 928, 929)." (Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 708.) The record indicates that petitioner, in discharging her duty to see that withholding taxes were filed and paid, merely relied on the competence and good faith of the corporation's comptroller and payroll service. At the time of her assumption of the presidency of the corporation, petitioner was made aware of existing withholding tax deficiencies which she subsequently paid. However, the record does not disclose that petitioner made subsequent inquiries as to whether or not withholding tax returns were being filed and taxes paid during the period of her control of the corporation. While such functions were apparently delegated to the comptroller, it was petitioner's duty to supervise the activities of the comptroller, an employee who was hired by and who was directly reportable to petitioner. It is, therefore, determined that petitioner disregarded her duty (see \_\_\_ Matter of Ragonesi v. State Tax Commn., supra) and this disregard results in a finding that such failure to act was "willful" within the meaning of Tax Law § 685(g) (see \_\_\_ Matter of Levin v. Gallman, supra).

G. That the petition of Lillian E. Davison is granted only to the extent indicated in Finding of Fact "2"; that the Audit Division is directed to modify the Notice of Deficiency issued July 25, 1983 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
February 19, 1988

---

ADMINISTRATIVE LAW JUDGE